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The situation of human rights and fundamental freedoms of indigenous people

Note by the Secretary-General*

The Secretary-General has the honour to transmit to the members of the General Assembly the report of Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, pursuant to paragraph 18 of Commission on Human Rights resolution 2005/51 of 20 April 2005.

* The report is being submitted after the deadline owing to the need for consultations.

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The situation of human rights and fundamental freedoms of indigenous people

Summary

The present report, on activities carried out from November 2005 to October 2006, highlights some concerns which the Special Rapporteur deems to be worthy of special and urgent attention.

The activities carried out by the Special Rapporteur in fulfilment of the mandate entrusted to him by the Commission on Human Rights in 2001 have focused on (a) thematic investigation of issues that have an impact on the situation of human rights and fundamental freedoms of indigenous people; (b) country visits; and (c) communications with Governments with respect to alleged violations of indigenous people's human rights and fundamental freedoms throughout the world.

In this report, the Special Rapporteur refers in particular to the relevance for indigenous people of the adoption by the General Assembly of the draft United Nations Declaration on the Rights of Indigenous Peoples, which the Human Rights Council adopted at its first session.

During the period under review, the Special Rapporteur undertook official missions to New Zealand and Ecuador and made follow-up visits to Guatemala, Mexico and Canada.

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I. Introduction

1. The present report, submitted pursuant to Commission on Human Rights resolution 2005/51 of 20 April 2005, is the third report submitted to the General Assembly by Mr. Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. During the period under review, the Special Rapporteur submitted his annual report to the Human Rights Council at its second session (E/CN.4/2006/78 and Add.1-5).

2. This report covers the activities carried out during the period November 2005 to October 2006. Like the Special Rapporteur's preceding report to the General Assembly (A/60/358), it underscores certain issues of concern which, in his view, are of particular importance for the promotion and protection of the human rights of indigenous people.

3. The functions included in the Special Rapporteur's mandate are described in resolutions 2001/57, 2002/65, 2003/56, 2004/62 and 2005/51 of the Commission on Human Rights and, in greater detail, in previous reports of the Special Rapporteur (E/CN.4/2002/97, paras. 2 and 3, and E/CN.4/2004/80, para. 2). The international legal framework for the Special Rapporteur's work is also set out in the above-mentioned reports (E/CN.4/2002/97 and E/CN.4/2004/80/Add.1, paras. 79-101).

4. By its resolution 2005/51, the Commission on Human Rights, for the first time, requested the Special Rapporteur to begin preparing a study regarding best practices carried out to implement the recommendations contained in his general and country reports and to submit a progress report to the Commission at its sixty-second session.

II. Activities carried out by the Special Rapporteur in fulfilment of his mandate

5. The annual report submitted by the Special Rapporteur to the Human Rights Council in September 2006, which was followed by an interactive dialogue with States and non-governmental organizations, covered activities carried out from March 2005 to March 2006. During that period, as in the previous years of his mandate, he continued to focus on three areas of action: first, thematic investigation and development of issues that have an impact on the situation of human rights and fundamental freedoms of indigenous people, as reflected in the main report; secondly, country visits; and thirdly, urgent appeals and alleged violations concerning indigenous people's human rights and fundamental freedoms.

6. The activities carried out in these areas are described in the Special Rapporteur's main report (E/CN.4/2006/78) and its annexes. Five annexes were submitted in 2006 covering the following topics: communications received and sent during the period under review with respect to alleged violations of human rights and fundamental freedoms of indigenous people (E/CN.4/2006/78/Add.1); the Special Rapporteur's report on his visit to South Africa from 28 July to 8 August 2005 (E/CN.4/2006/78/Add.2); the report on his visit to New Zealand from 16 to 26 November 2006 (E/CN.4/78/Add.3); his progress report on the study regarding best practices carried out to implement the recommendations in his annual reports, as required by the Commission on Human Rights (E/CN.4/2006/78/Add.4); and

reports on the conclusions and recommendations of international seminars organized by the Inter-Parliamentary Union and the University of Arizona, on the topic of my main report, held in July and October 2005, respectively (E/CN.4/2006/78/Add.5).

7. In 2006 the Special Rapporteur devoted his thematic report to the study of the implementation of standards and jurisprudence relating to the rights of indigenous people. During the last decade numerous constitutional and legislative reforms have been carried out in many countries in which the indigenous peoples and their civil, political, economic, social and cultural rights are recognized. Some of these legislative provisions are broader than others; in some cases recognized rights are limited and subordinated to the interests of third parties or broader national interests.

8. However, the standards and jurisprudence that have evolved in recent years concerning indigenous people still have not done enough to bring about substantive changes in their daily lives. The "implementation gap" between standards relating to indigenous rights and the effective enjoyment of those rights poses a serious problem meriting the close attention of the Human Rights Council and the General Assembly. In the present report the Special Rapporteur has identified the factors which he believes contribute to this gap.

9. It has been pointed out that in many countries there is a gap between international standards and principles regarding the human rights of indigenous people and domestic legislation. International standards, even when ratified, do not always and automatically become part of domestic law. They are sometimes ignored by public officials as well as in the case law of the courts. Another problem reported is the lack of consistency between different laws, such as those relating to natural resources management, and indigenous or human rights legislation.

10. The main problem, however, is the "implementation gap" that is, the vacuum between existing legislation and administrative, legal and political practice. This divide between form and substance constitutes a violation of the human rights of indigenous people. To close the gap and narrow the divide is a challenge that must be addressed through a programme of action for the human rights of indigenous people in the future.

11. Indigenous people are increasingly availing themselves of international mechanisms for the defence of their human rights. At the regional level the inter-American human rights system has played an increasingly important role and is beginning to be useful to the African regional system. At the international level the International Labour Organization (ILO) and the United Nations treaty bodies have unquestionable moral authority that is being increasingly exercised in defence of the rights of indigenous peoples. A new circle of good practices has thereby been established, bringing together indigenous peoples, States and international mechanisms, but does not always obtain satisfactory results.

12. A sign of the growing interest in the "implementation gap" phenomenon and the quest for constructive solutions to help to remedy the matter is the attention paid to follow-up on the Special Rapporteur's recommendations. In that context, as mentioned earlier, pursuant to its resolution 2005/51, the Commission on Human Rights requested the Special Rapporteur to conduct a study regarding best practices carried out to implement recommendations contained in his general and country reports.

13. A progress report on this study was presented to the Human Rights Council during its recent session (E/CN.4/2006/78/Add.4). In that report, the Special Rapporteur stated that "[t]he information received to date, while extremely interesting, is still not quite what is needed in preparing a study that is supposed to make it possible to move forward on this issue in some way. The Special Rapporteur believes it is essential to ... find out about specific measures taken on the basis of the recommendations made in each of his reports".

14. The Special Rapporteur intends to continue with follow-up on the Commission's request for the presentation of a final study and has therefore planned several activities that should allow him to gather the information needed to complete the study.

A. Country visits

15. During the period covered by this report, the Special Rapporteur undertook two official missions to observe the human rights situation of indigenous peoples in New Zealand and Ecuador. He submitted a report on the first mission to the Human Rights Council at its recent session (E/CN.4/2006/78/Add.3) and is expected to present the second report shortly.

1. Mission to New Zealand

16. At the invitation of the Government and Maori organizations, the Special Rapporteur visited New Zealand in November 2005. He was encouraged by the Government's commitment to reduce the existing inequalities between Maori, who represent around 15 per cent of the total population, and non-Maori regarding several social and human development indicators such as health, housing, education, income levels and employment, areas in which inequalities still exist. He was also heartened by the commitment of the authorities to ensure that the country's development was shared by all groups in New Zealand society.

17. Despite the progress made, many Maori are impatient with the pace of redress for breaches by the Crown of the 1840 Treaty of Waitangi, which forms the legal basis for relations between Maori and the State.

18. Nowadays, many Maori are particularly concerned by the new legislation governing coastal areas that extinguishes customary Maori rights over those lands and replaces them with a statutory process for the recognition of customary or aboriginal title.

19. In his report, the Special Rapporteur made several recommendations to the Government of New Zealand, proposing measures aimed at strengthening and consolidating Maori human rights, including their collective property rights to land and coastal areas.

2. Mission to Ecuador

20. In April 2006, the Special Rapporteur undertook an official mission to Ecuador, in response to an invitation by the Government and indigenous organizations of that country. He visited several indigenous communities along the coast, in the sierra and in the Amazon region, and he interviewed high-level officials and representatives of all the indigenous nationalities.

21. Although this topic will be further discussed in the Special Rapporteur's next submission to the Human Rights Council, he nevertheless wishes to take this opportunity to express some of his impressions. First of all, he has detected a vast juridical vacuum in the protection of indigenous rights. Although the 1998 Ecuadorian Constitution embodies specific collective rights for indigenous peoples and nationalities in various areas, these rights have not yet been incorporated into the corresponding secondary legislation, which has made it difficult for them to be fully implemented. The Government has set up a number of State institutions to address the situation of indigenous peoples, which has created opportunities for indigenous people to participate in the execution of governmental policies, but since they are not based on specific laws, they are institutionally weak.

22. Over the years, the State of Ecuador has recognized some indigenous territories, particularly in the Amazon region, and has allowed the communities to negotiate agreements governing the use of land and resources. However, much concern has been raised by the gradual destruction of the indigenous habitat and the impact of extractive activities, in particular the exploration and exploitation of oil, mining and forestry, on the environment and indigenous rights, mainly in the areas around the Amazon, the northern border and the Pacific coast. The problems faced by remote or voluntarily isolated populations deserve special attention, as they are adversely affected by the illegal felling of trees and other illicit activities in their territories. Oil exploration activities on indigenous lands have likewise triggered resistance in some communities, as in the case of the Sarayaku people in the Amazon region, who have sought protection from the inter-American human rights system.

23. Despite economic growth in recent years, the various indicators of indigenous peoples' economic, social and human development remain below the national average. In addition to rural poverty, the situation of indigenous people living in urban areas, especially women, has become increasingly difficult.

24. The lack of compatible legislation in the area of indigenous justice leads to instances of conflicts of jurisdiction between indigenous jurisdiction and ordinary justice. Problems concerning indigenous people's access to the justice system are worsened by the lack of an adequate ombudsman system, the absence of translators and the low level of intercultural sensitivity among justice practitioners and public officials in general. The Special Rapporteur has made several recommendations to the Government of Ecuador and proposals for international technical cooperation, which, if properly implemented, could improve the human rights situation of the indigenous people of Ecuador.

B. Follow-up to the recommendations contained in the reports of the Special Rapporteur

25. At the request of the Commission on Human Rights, the Special Rapporteur carried out activities to study the follow-up in various countries to recommendations contained in his reports. In May he paid a follow-up visit to Guatemala, to determine what changes had taken place since his official visit in 2002. He was then able to confirm the importance and need for follow-up activities through governmental human rights monitoring mechanisms, national institutions and civil

society organizations in their work to improve the human rights situation in the various countries.

26. There have been a number of changes and improvements in the human rights situation of indigenous people in Guatemala. The State authorities' increasing awareness of the need to prioritize human rights issues is especially significant and has led to the creation of various forums for dialogue between the indigenous peoples and the Government.

27. Official recognition of crimes committed during the armed conflict and having a profound impact on indigenous communities is also particularly significant. In that respect, the importance of the first cases of judicial sentences for discrimination against indigenous people should be stressed.

28. In spite of this significant progress, the visit to Guatemala also created an opportunity to illustrate that the level of discrimination and racism against indigenous peoples is still very high, and the status of indigenous women and children was cause for much concern. During his mission, the Special Rapporteur was also able to observe great delays in the process to implement the Peace Agreements, in particular the Agreement on Identity and Rights of Indigenous Peoples. The bodies created for the protection of indigenous rights do not have an adequate institutional base or budgetary allocations. The system of justice administration requires substantial and urgent support in order to ensure that indigenous persons, especially indigenous women, have access to it when their human rights are violated. The recognition of indigenous customary law, under the umbrella of Guatemalan legislation itself and within the framework of respect for international human rights standards, is therefore crucial.

29. Despite official recognition of the atrocities committed during the armed conflict and the State's responsibility, the indigenous communities clearly feel that justice will not be served until all the perpetrators of these crimes are punished.

30. In Mexico, a number of activities have been aimed at developing an appropriate methodology to assess the degree of compliance with the Special Rapporteur's recommendations. Together with governmental authorities and indigenous and human rights organizations, the Special Rapporteur has taken part in some of these activities. He has also visited indigenous communities in various parts of the country to obtain first-hand information. The authorities have dealt with some of the needs expressed by many indigenous communities in Mexico, providing such things as infrastructure works, social services and support for productive activities. Given the considerable backlog of accumulated needs, however, these forms of support have been insufficient. The portion of the Government's budget devoted to solving the enormous problems facing indigenous communities has not been increased in recent years. Worse yet, in some cases the authorities have taken decisions on development projects in indigenous areas whose outcome could have a serious impact on human rights in the affected communities, as has been the case in the La Parota dam construction project in the State of Guerrero. Modification of the Indigenous Act of 2001 — which has been incorporated into the Constitution — and compliance with the San Andrés peace accords, as recommended in the Special Rapporteur's report on his official mission to Mexico in 2003, are still pending.

31. On 2 and 3 October 2006, the Special Rapporteur took part in a meeting held in Ottawa with representatives of the Government of Canada and various indigenous

and human rights organizations on follow-up to his recommendations after his mission to Canada in 2004. On 5 to 7 October, an international expert seminar was held on general follow-up to his Special Rapporteur's recommendations. These events, which reflect a growing interest in the matter of implementation, will provide important inputs for the completion of the study of "best practices" carried out to implement the Special Rapporteur's recommendations, as requested by the Commission on Human Rights. Likewise, this type of event represents a model for strengthening activities aimed at following up the Special Rapporteur's recommendations in other previously visited countries. Similar events in Chile and the Philippines are being planned for the year 2007.

C. Communications with Governments and follow-up to reports of violations of the human rights of indigenous people

32. The Special Rapporteur has continued to receive a growing number of communications from indigenous and civil society organizations containing complaints of violations of indigenous peoples' rights. Increasingly, these communications have resulted in letters of allegation or, where there exists a serious or imminent threat to human rights, urgent appeals to Governments. The rise in the number of communications is a sign that indigenous people and organizations are becoming more aware of reporting mechanisms, but it is also a disturbing reminder of the number of serious violations and restrictions of the human rights of these people. Of special concern is that only a few States involved in this communications system have followed up the letters of allegation and urgent appeals addressed to them in any systematic or satisfactory way. The Special Rapporteur has recommended to the Human Rights Council that special attention should be given, during the universal periodical review of special procedures, to this serious constraint on the building of an effective system for protecting indigenous peoples' rights.

III. Future international protection of indigenous rights

33. At the international level, the Special Rapporteur points out the importance of the adoption, on 29 June 2006, of the draft United Nations Declaration on the Rights of Indigenous Peoples by the Human Rights Council at its first session. This event, which took place after nearly 20 years of negotiations in Geneva, is an outcome that has been long awaited by indigenous peoples and by the universal human rights community. Unfortunately, this new international human rights instrument was not adopted by consensus, and it is therefore particularly important for this General Assembly to endorse its adoption and thereby demonstrate support for the constructive work of the Human Rights Council.

34. The draft Declaration, in the Special Rapporteur's view, is already a useful mechanism for the protection and promotion of human rights among indigenous peoples throughout the world and a reflection of the emerging international consensus on the content of indigenous peoples' rights. The Special Rapporteur sincerely hopes that the Council and this Assembly will continue to give this important development in the human rights field all the attention it deserves.

35. Various new perspectives have opened up in confronting the challenge represented by the draft Declaration, a milestone in the efforts to protect the human rights of indigenous peoples. One is the need to clarify and enhance the human rights and international obligations of States deriving from existing human rights instruments, and to update their content in the light of the draft Declaration, since the latter is not a legally binding instrument. National and international courts will no doubt play an important and innovative role in this process.

36. The draft Declaration will also serve as a guide for the actions of human rights treaty bodies in their work of interpreting the scope of the provisions of these treaties in relation to States parties. Thus, the Declaration will help to enhance and consolidate the international case law produced by universal and regional bodies in relation to the rights of indigenous peoples.

37. The draft Declaration will be a valuable factor in the discussion about future international standards in indigenous matters, both in the international human rights system and in regional or specialized areas. Accordingly, the adoption of the Declaration will also give a strong impetus to the clarification of emerging or existing customary law concerning the rights of indigenous peoples at the international level.

38. As in the case of previous human rights declarations (the Universal Declaration of Human Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities or other declarations that have subsequently become international conventions), the draft United Nations Declaration on the Rights of Indigenous Peoples can play an important role in guiding national legislative processes linked to indigenous peoples' rights in countries where this issue is relevant and/or immediate. The draft Declaration is already an essential frame of reference for the indigenous peoples who are holding a dialogue with Governments in the quest for innovative legislative solutions to old problems of discrimination, exclusion, cultural negation and lack of legal recognition.

39. A careful re-evaluation of the various international promotion and cooperation activities being carried out by United Nations bodies will also be useful, especially in the framework of the Millennium Development Goals, in order to achieve full implementation of the provisions of the Declaration, especially in countries where indigenous populations live.

40. Lastly, I should like to make an urgent appeal to all States members of this Assembly to adopt the draft United Nations Declaration on the Rights of Indigenous Peoples transmitted to it by the Human Rights Council.